Filed 2/3/05 Frasier v. Hanson CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DANIEL LYNN FRASIER, JR., a Minor, etc., Plaintiff and Respondent, v. BRUCE A. HANSON, Defendant and Appellant.	B169179 (Los Angeles County Super. Ct. No. BC186857)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed.

Thelen Reid & Priest, Curtis A. Cole, Eileen Spadoni, Hailey Hibler; LaFollette, Johnson, DeHaas, Fesler, Silberberg & Ames, Marshall Silberberg and Laura M. Morris for Defendant and Appellant.

Brenda C. Andrade; Steven R. Andrade; Lascher & Lascher and Wendy Cole Lascher for Plaintiff and Respondent.

Horvitz & Levy, H. Thomas Watson and S. Thomas Todd for California Medical Association, California Dental Association, and California Healthcare Association as Amici Curiae on behalf of Defendant and Appellant.

A child's aorta was torn during surgery. By the time the problem was found and corrected, the child had suffered irreversible injuries. The child sued the surgeon, the hospital where the surgery was performed, and some of the doctors who worked at the hospital. Before trial, the hospital and its doctors settled with the child, leaving the surgeon as the only defendant. At trial, the jury was instructed that, assuming the surgeon was negligent, it was immaterial whether the negligence occurred during or after the surgery. The jury returned a verdict in favor of the child and found the surgeon was 100 percent at fault. On the surgeon's appeal, we found instructional error, reversed, and remanded for a new trial. (*Frasier v. Hanson* (Nov. 1, 2001, B143936) [nonpub. opn.].)

The case was tried for a second time, and the court modified the instructions to conform to our prior opinion. The jury once again rendered a verdict in favor of the child, expressly found that the negligence occurred during the surgery, and attributed 34.6 percent of the fault for the child's injuries to the surgeon. The surgeon appeals, contending there were instructional and evidentiary errors and, additionally, claiming he was entitled to an offset for some of the child's past medical expenses covered under the Civilian Health and Medical Program. We reject these claims of error and affirm the judgment.

FACTS

A.

On March 3, 1995, Daniel Lynn Frasier, Jr. (then six years old) underwent cosmetic surgery at Children's Hospital of Los Angeles to repair a congenital chest wall depression of the breast bone (a condition known as pectus excavatum). Bruce A. Hanson, M.D., a pediatric cardiothoracic surgeon, performed the lengthy surgery, assisted by Hesham Soliman, M.D., and Keith

Ivans, M.D. After surgery, Daniel was moved to a pediatric intensive care unit, where Dr. Hanson examined Daniel, then went home. At about 7:45 p.m., Daniel was moaning and restless, and a nurse concluded he was in pain. Dr. Paul Horowitz ordered morphine and Dr. Soliman was advised of Daniel's changed condition. Within minutes, Daniel became unresponsive, his blood pressure dropped, and he suffered a loss of mental faculties. At about 8:00 p.m., Dr. Soliman, joined by Neal Patel, M.D., and Christopher Newth, M.D., started to monitor Daniel and to consider various alternatives, but they did not call Dr. Hanson. Dr. Patel ordered Narcan to counteract the effects of the morphine.

At about 8:50 p.m., Daniel suffered a cardiac arrest. Closed chest compressions were commenced and resuscitative medications were administered. By 9:02 p.m., Daniel's pupils were fully dilated and non-reactive (meaning he was oxygen-deprived). Dr. Newth diagnosed a cardiac tamponade (blood was flowing into Daniel's pericardial sac, constricting his heart, and preventing circulation) and asked Dr. Soliman to open Daniel's chest so they could drain the collecting blood. Dr. Soliman refused. Dr. Newth then called Giovani Luciani, M.D., and he opened Daniel's chest at about 9:30 p.m., at which time he found a cardiac tamponade, drained Daniel's pericardium, and found a "tear" in Daniel's aorta. By the time Daniel's condition was stabilized, he had suffered brain damage and was permanently paralyzed.

B.

In 1998, Daniel sued Dr. Hanson, Children's Hospital, Dr. Soliman, Dr. Ivans, and five other doctors (including Drs. Patel and Newth) for medical malpractice. The defendants answered, discovery ensued, and (in May 1999) Drs. Patel and

Newth prevailed on motions for summary judgment. In late 1999, Drs. Soliman and Ivans and Children's Hospital settled with Daniel for $1,060,000, and the trial court found the settlement was made in good faith. (Code Civ. Proc., § 877.6.)

In February 2000, Daniel's claims against Dr. Hanson (the only remaining defendant) were tried to a jury. It was undisputed (1) that, at some point, Daniel's aorta was damaged and that the damage caused the tamponade, (2) that it was proper for Dr. Hanson to leave the hospital when he did, and (3) that Dr. Soliman's post-surgery treatment of Daniel was below the standard of care. Everything else was disputed, with Daniel's experts testifying that Daniel's aorta had been punctured during the surgery, and Dr. Hanson's experts testifying that the tear was caused by a combination of drugs improperly administered after the surgery and the compression of Daniel's chest during the resuscitation efforts.

The jury found Dr. Hanson was negligent and that he was 100 percent at fault for Daniel's injuries. The jury awarded Daniel about $5.5 million but, as noted above, the judgment entered on that verdict was reversed on Dr. Hanson's first appeal.

C.

The evidence at the second trial, held in early 2003, was essentially the same as the evidence presented at the first trial. Daniel once again presented experts who testified that his aorta was torn during the surgery, that the tear caused the post-surgery cardiac tamponade, which caused the cardiac arrest and his permanent injuries. For his part, Dr. Hanson once again offered expert testimony to show that the tear could not have happened during surgery and

that it had to have been caused by the improper drugs administered after surgery and the resuscitative efforts following Daniel's cardiac arrest.

This time, the jury was given special verdict forms. In addition to finding in favor of Daniel, the jury expressly found that Dr. Hanson was negligent *during the surgery*. The jury allocated 34.6 percent of the fault to Dr. Hanson, and awarded damages to Daniel for pain and suffering (about $7.2 million), past medical care ($170,000), future medical care (about $5.2 million), and future lost earnings (about $3.1 million). The trial court reduced the pain and suffering award as required by MICRA, gave Dr. Hanson credit for the amount of the pretrial settlements (reducing Daniel's maximum lifetime recovery for pain and suffering to about $85,000), ordered a periodic payment schedule, and awarded pre-judgment interest of about $1.6 million. Dr. Hanson appeals.

DISCUSSION

I.

Dr. Hanson contends the second trial suffered from the same instructional infirmities as the first trial. We disagree.

A.

At the first trial, the jury was instructed (in the order listed) according to BAJI Nos. 6.05 (duration of physician's responsibility), 6.06 (liability of surgeon for negligence of assistants and nurses, the "captain of the ship" instruction), 6.35 (conditional res ipsa loquitur), 6.36 (causal relation re res ipsa loquitur), 4.02 (res ipsa loquitur), and 14.66 (damages for additional harm resulting from original injury). On the first appeal, we held that it was error to instruct the jurors that Dr. Hanson was liable for the negligence of others after, as well as during, the

surgery. As we explained, "whatever liability Dr. Hanson might have for the negligence (if any) of the residents that occurred during Daniel's surgery, Dr. Hanson is not liable for the negligence (if any) that first occurred after he left the hospital." (*Frasier v. Hanson, supra,* typed opn. at p. 12.)

With regard to res ipsa loquitur, Dr. Hanson contended that, "'instead of asking the jury to first determine whether the injury occurred during the surgery, [the instructions, by explaining res ipsa loquitur in the order noted above] first ask[ed] the jury to determine whether the injury [was] one that ordinarily does not occur in the absence of negligence and then whether the injury occurred while [Daniel] was under the exclusive control or care of [Dr. Hanson].'" (*Frasier v. Hanson, supra,* typed opn., p. 9, fn. 4.) We found the point about the *order* of the instructions "well taken" but did not go beyond that because we reversed based on other instructional errors. (*Ibid.*)

B.

At the second trial, the court gave modified versions of BAJI Nos. 6.36, 6.35, and 4.02, and told the jurors at the outset that, "[i]n this case, it is your duty to determine first whether the injury for which [Daniel] seeks to recover damages was caused by [Dr. Hanson]. [¶] If you find that the operation performed by Dr. Hanson was not a cause of any injury to [Daniel], then you will find against [Daniel] and in favor of [Dr. Hanson]." By special verdict, the jurors thereafter found that Dr. Hanson was "negligent . . . ***during*** the pectus excavatum surgery."[1] (Emphasis added.) Dr. Hanson does ***not*** contend the evidence was

---

[1] This special verdict defeats Dr. Hanson's suggestion that the jury found him liable based on the acts of others that occurred after the surgery, "including and particularly [the acts of] Dr. Soliman," and the fact that the jurors attached a note to their verdict does not suggest

insufficient to support this finding; indeed, he simply ignores it. Because Dr. Hanson was responsible for any negligence that occurred during the surgery, and because the evidence establishes that, in the absence of negligence, an aorta cannot be torn or punctured during surgery, the instruction was proper.

C.

Dr. Hanson contends the "captain of the ship" instruction given at this trial suffers from the same defects as the one given at the first trial. We disagree.

1.

At the first trial, the jurors were instructed according to BAJI No. 6.06: "Regardless of who employs or pays an assisting surgeon who takes part in the performance of surgery or services incidental to such surgery, if, while engaged in any such service, the assisting surgeon is under the direction of a certain surgeon in charge, so as to be the surgeon's temporary servant or agent, any negligence on the part of any such assisting person is the negligence of such surgeon." In this form, the instruction did not distinguish between the surgeon's liability while surgery is in progress (when he is subject to liability on a respondeat superior theory), and his responsibilities after the surgery is completed (when the

---

otherwise. Attached to the verdict sheets was this note: "We do not consider this verdict to be a victory for one side or another. Rather it is the result of a tragedy that befell both parties eight years ago. None of us believe that Dr. Hanson ***knowingly*** violated his oath to do no harm. Our duty was to consider the facts of this case and to follow the instructions of the court. We have done so to the best of our abilities. ***We have found Dr. Hanson negligent*** according to the letter of the law, but that is as far as our judgment goes. Each one of us has great respect for the doctor's skill and professionalism. That respect has never wavered." (Emphasis added.) By its plain language, the note shows the jury's belief that this was a horrible accident caused by Dr. Hanson's negligence, not by his willful misconduct or wanton disregard for the safety of his patient. The note says the jurors followed the "letter of the law," meaning they found a duty owed and breached, causation, and damages. There is nothing about the note that suggests they found the doctor's liability was based on the acts of others that occurred after the surgery was completed. The note is entirely consistent with the special verdict.

captain of the ship doctrine is not applied). (*Ybarra v. Spangard* (1944) 25 Cal.2d 486, 492; *Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 966-969.)

2.

At this trial, the court modified the instruction by adding this language: "However, any negligence of the assisting surgeon that occurs at a time after the performance of the pectus excavatum surgery, when the assisting surgeon is not acting under the direction of the surgeon in charge, is not to be deemed as negligence of the surgeon in charge." To make sure the jurors understood, the court immediately thereafter instructed the jury according to BAJI No. 6.36 that, "[i]n this case, it is your duty to determine first whether the injury for which [Daniel] seeks to recover damages was caused by [Dr. Hanson]. [¶] If you find that the operation performed by [Dr. Hanson] was not a cause of any injury to [Daniel], then you will find against [Daniel] and in favor of [Dr. Hanson]."

The distinction was reiterated in the instructions about damages (BAJI No. 14.66), when the jurors were told that if they found Dr. Hanson was "liable for injury because the injury occurred during the performance of the original pectus excavatum surgery," Dr. Hanson was also liable for any aggravation of the original injury.

Quite plainly, the modification cured the defect present at the first trial and the instructions given at the second trial were a correct statement of the law.[2]

D.

We reject Dr. Hanson's contention that the "trial court eviscerated the defense at the second trial, just as at the first [trial], by instructing the jury regarding 'additional harm' under BAJI [No.] 14.66"

The jury was instructed: "***If you find that [Dr. Hanson] is liable for injury because the injury occurred during the performance of the original pectus excavatum surgery***, [Dr. Hanson] is also liable for any aggravation of the original injury or for any additional injury caused by negligent medical or hospital treatment or care of the original injury."[3] This instruction applied if, and only if, the jurors first found that Daniel's aorta was torn during surgery and, as such, was a correct statement of the law. (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1606 [subsequent negligent medical treatment is foreseeable as a matter of law]; *Blecker v. Wolbart* (1985) 167 Cal.App.3d 1195, 1201.)[4]

---

[2] Insofar as Dr. Hanson contends the "captain of the ship" concept is outmoded, we reject that argument for the same reason we rejected it on the first appeal -- it is an issue for the Supreme Court, not for us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

[3] There is no doubt that the jury understood this instruction. As the trial court explained in response to a question from the jury about BAJI No. 14.66, "if the jury finds that Dr. Hanson is liable because the jury finds that the aorta was injured in the original pectus excavatum surgery, then the jury may consider whether there are additional injur[ies] or damages because of aggravation of that original injury as a result of later events."

[4] Our rejection of Dr. Hanson's claims of instructional error makes it unnecessary to consider his contention that the combination of allegedly erroneous instructions was prejudicial.

II.

Dr. Hanson contends the trial court "unfairly" prevented him from calling two of his "most critical" expert witnesses because Daniel's lawyer had used up the entire time allotted for the trial of this case. We reject both Dr. Hanson's characterization of the record and his claim of error.

A.

In October 2002, the second trial was set for February 10, 2003. In a declaration filed in October 2002, Dr. Hanson's lawyer represented to the court that her "office ha[d] contacted all of the defense experts . . . expected to testify at the upcoming trial . . . . All percipient witness[es] and all but one defense expert are available to testify in the month of February 2003. The one expert who is not available during the month of February will be available commencing March 3, 2003, the first Monday in March. . . . [T]he first trial lasted approximately 17 days. As such, if the upcoming trial spans a similar period of time as the first trial, it should not present a problem that one of our experts is not available until March."

On December 20, 2002, Dr. Hanson designated nine expert witnesses, including Arnold S. Leonard, M.D., but excluding Robert Shuman, M.D. (one of Dr. Hanson's experts at the first trial). Dr. Hanson nevertheless included Dr. Shuman (as well as Dr. Leonard) when he later filed his proposed witness list (on January 8, 2003). In early February, Daniel and Dr. Hanson submitted a combined stipulated witness list in which Dr. Hanson stated his intent to call Dr. Leonard "to testify as to the surgery, the standard of care issues, and causation," but did not mention Dr. Shuman.

On February 7, the parties filed a joint witness list. Dr. Hanson listed Michael Worthen, M.D., who was expected to testify about the cause of the injury and "the physiologic explanations for the injury and the pectus surgery," and Dr. Leonard, who was "expected to testify as to the surgery, the standard of care issues, and causation." The list also identified Dr. Shuman as a witness "[t]o be called if Dr. Leonard [was] not." The joint witness list included Daniel's objection to Dr. Shuman, on the ground that "he was not designated" by Dr. Hanson.

Daniel tried his case anticipating a defense based on the opinions previously expressed by Dr. Leonard. On March 5 (the 13th day of trial), Dr. Hanson's lawyer (who had previously told the court he anticipated a 17-day trial) informed the court that he wanted to call Dr. Shuman because the trial had taken so long that Dr. Leonard was no longer available to testify. Daniel objected and moved to exclude Dr. Shuman's testimony on the ground that Dr. Shuman had not been designated as an expert witness, explaining that Dr. Shuman's opinions were not the same as Dr. Leonard's opinions. The trial court conditionally denied Daniel's motion to exclude Dr. Shuman's testimony, subject to a showing by Dr. Hanson that Dr. Leonard was in fact unavailable, and subject to Dr. Shuman being deposed before he testified.

Dr. Shuman was deposed on Saturday, March 8, at which he testified (among other things) that he had been told two weeks before trial, by Dr. Hanson's lawyer, that he would be needed as an expert witness at trial. When trial resumed, Daniel renewed his objection to Dr. Shuman, explaining that Dr. Hanson had intended all along to call Dr. Shuman, notwithstanding his failure to designate him as an expert witness. Daniel also explained to the court that

Dr. Shuman's deposition revealed that, contrary to Dr. Hanson's representation, Dr. Shuman's current testimony would not be the same as his testimony at the first trial -- and the new theory came as a complete surprise to Daniel.

The trial court ultimately ruled that Dr. Shuman would not be permitted to testify but that Dr. Hanson could read Dr. Shuman's testimony from the first trial.

B.

For several reasons, we reject Dr. Hanson's contention that the trial court abused its discretion.

First, the record supports the trial court's finding that Dr. Hanson decided well before trial to call Dr. Shuman as an expert witness yet failed to designate him as an expert and did not raise the issue until the middle of trial.

Second, Dr. Hanson never did establish a legitimate reason for Dr. Leonard's purported unavailability, and Dr. Hanson did not explain his failure to call Dr. Leonard out of order if, in fact, Dr. Leonard's schedule had to be accommodated.

Third, the trial court did not exclude Dr. Shuman's testimony in its entirety, but simply limited his testimony to that which was presented at the first trial.

Fourth, Dr. Hanson has not presented any credible argument to suggest Dr. Shuman's live testimony at the second trial would have affected the verdict. Assuming Dr. Shuman's live testimony was new and different, as Daniel claimed, Dr. Shuman would have had to explain his earlier inconsistent testimony -- a

factor totally ignored by Dr. Hanson. If, as Dr. Hanson now contends, Dr. Shuman's live testimony would have been the same as his testimony at the first trial, any error in excluding it had to be harmless in light of the fact that his former testimony was read to the jury.

We see no error and no prejudice. (*Basham v. Babcock* (1996) 44 Cal.App.4th 1717, 1724.)

III.

Dr. Hanson contends the trial court erroneously refused to apply Civil Code section 3333.1 and, as a result, wrongly excluded evidence that Daniel's past medical expenses were covered under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS, 42 U.S.C. § 2651 et seq.).[5] We disagree.[6]

---

[5] As relevant, Civil Code section 3333.1, subdivision (a), provides that, in "the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to [1] the United States Social Security Act, [2] any state or federal income disability or worker's compensation act, [3] any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and [4] any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence."

[6] The California Medical Association, the California Dental Association, and the California Healthcare Association have filed an amici curiae brief joining in and expanding on Dr. Hanson's argument about CHAMPUS. We include amici in our subsequent references to Dr. Hanson.

A.

Because the United States Navy paid Daniel's past medical expenses ($170,000), the Navy is entitled to reimbursement from Dr. Hanson of that amount. (42 U.S.C. § 2651;[7] 32 C.F.R. §199.1(a), (d); 28 C.F.R. § 43.2(a).)[8] To that end, the Navy asked Daniel's lawyers to pursue its subrogation rights, and Daniel's lawyers, not having any real choice in the matter agreed in writing to do so. (*Commercial Union Ins. Co. v. U.S.* (D.C. Cir. 1993) 999 F.2d 581, 586-587 [the Navy's statutory right to subrogation means that it steps into Daniel's shoes in order to assert a claim to the part of the total damages due to it].) As explained in the agreement prepared by the government and signed by Daniel's lawyer on March 6, 2003, the Navy is prohibited by statute from paying a fee for the assertion of its claim (5 U.S.C. § 3106), and the Navy's claim "is an independent cause of action rather than a lien on any settlement or

---

[7] As relevant, 42 U.S.C. § 2651(a), part of the Federal Medical Care Recovery Act, provides that, "[i]n any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished . . . and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . has against such third person to the extent of the reasonable value of the care and treatment so furnished . . . . The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person . . . to assign his claim or cause of action against the third person to the extent of that right or claim."

[8] 28 C.F.R. §43.2 (a) provides: "In the discretion of the Department or Agency concerned, any person furnished care and treatment under circumstances in which the regulations in this part may be applicable . . . may be required: [¶] (1) To assign in writing to the United States his claim or cause of action against the third person to the extent of the reasonable value of the care and treatment furnished . . . ; [¶] (2) To furnish such information as may be requested concerning the circumstances giving rise to the injury or disease . . . and concerning any action instituted or to be instituted by or against a third person; [¶] (3) To notify the Department or Agency concerned of a settlement with . . . a third person; and [¶] (4) To cooperate in the prosecution of all claims and actions by the United States against such third person."

judgement" obtained by Daniel -- so that "any contingent fee arrangement [between counsel and Daniel] applies only to [Daniel's] claim and not to the Government's portion of the recovery."

As a result of his lawyer's statutorily compelled agreement, the Navy gets $170,000 when Daniel collects the money due to him under this judgment. (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681; and see *Mosey v. U.S.* (D. Nev. 1998) 3 F.Supp.2d 1133, 1134-1136.)

B.

At trial, Dr. Hanson pointed to Civil Code section 3333.1 and claimed he was entitled to tell the jurors that Daniel's past medical expenses had been paid by a collateral source, the Navy. We agree with Daniel that, had the jury been allowed to consider such evidence, it most likely would have excluded the amount paid by the Navy from the amount awarded to Daniel, thereby relieving Dr. Hanson of the obligation to pay $170,000 -- while leaving Daniel bound by his lawyer's agreement and responsible to the government for that amount. However Draconian MICRA may be in some respects (*Perry v. Shaw* (2001) 88 Cal.App.4th 658, 668), we do not believe the Legislature intended to take it quite this far. (*Brown v. Stewart* (1982) 129 Cal.App.3d 331, 341 [refusing to allow evidence of a Medi-Cal lien because the court did "not perceive it was the intent of the Legislature to bail out doctors and other health providers by the use of public funds"].)

In this context, we see no meaningful difference between CHAMPUS and Medi-Cal, and thus conclude the trial court properly excluded evidence about the benefits Daniel received from CHAMPUS.

IV.

We summarily reject Dr. Hanson's remaining arguments.

Dr. Hanson's contention that the trial court impermissibly excluded any evidence about "what it would cost to purchase an annuity" is unsupported by any authority suggesting that such evidence should have been admitted. Since the authority relied on by Daniel and the trial court (*Caldwell v. Southern Pacific Co.* (S.D. Cal. 1947) 71 F.Supp. 955, 960-961 [evidence of cost of annuity contracts inadmissible in a federal action governed by California law]) stands unrebutted in Dr. Hanson's opening brief, there is nothing more to be said about this point.

Dr. Hanson contends the trial court, having excluded evidence about the cost of an annuity, then erroneously relied on an annuity in structuring a periodic payment judgment. More specifically, Dr. Hanson contends the trial court should have used the gross amount of future damages as "the pivotal figure" in its determination. (*Holt v. Regents of University of California* (1999) 73 Cal.App.4th 871, 880.) This is nothing more than an attempt to relitigate a factual issue determined by the trial court. Periodic payment judgments are authorized by section 667.7, subdivision (a), of the Code of Civil Procedure, and both sides presented evidence about the manner in which such a judgment should be structured in this case. Since Dr. Hanson does not suggest the method

adopted by the court is legally wrong or impermissible, but only that his way was better, the trial court's decision will not be disturbed on appeal.

Finally, our rejection of all of Dr. Hanson's claims of error makes it unnecessary to consider his assertions about what ought to happen at "the third trial." As far as we are concerned, this is the end of the litigation road for this case.[9]

DISPOSITION

The judgment is affirmed. Daniel is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

MALLANO, J.

---

[9] Dr. Hanson's complaints about costs awarded by the trial court are, at best, premature. The cost bill was not entered until June 2004, just days before Dr. Hanson filed his opening brief on appeal and long after the judgment was entered in March 2003. Unless a separate notice of appeal was filed from the post-judgment order, it appears these issues are in any event moot. (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43.)